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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 705

SAM GIANCANA,

Petitioner,

VS.

MARLIN W. JOHNSON, Agent in Charge, Chicago Office of the Federal Bureau of Investigation,

Respondent.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

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MARLIN W. JOHNSON, Agent in Charge, Chicago Office of the Federal Bureau of Investigation,

Respondent.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

Sam Giancana, petitioner, prays that a writ of certiorari issue to review a judgment of the United States Court of Appeals for the Seventh Circuit.

OPINION BELOW.

The opinion of the Court of Appeals is reported in 335 F. 2d 366. A copy of the opinion is Appendix "A" to this petition.

JURISDICTION.

The judgment of the Court of Appeals was entered June 30, 1964. On September 28, 1964, Mr. Justice Brennan extended the time to petition for certiorari to and including November 20, 1964. Jurisdiction of this Court is invoked under 28 U.S.C., Sec. 1254(1).

QUESTIONS PRESENTED.

1. Whether the requisite jurisdictional amount is shown to be in controversy when, absent allegation that more than $10,000 was involved, evidence was submitted to the district court which proved that respondent, an agent of the federal government, deprived petitioner of personal liberties of a magnitude which amounted to physical arrest without warrant or conviction.

2. Whether the Court of Appeals was correct in holding that absence of formal jurisdictional allegations deprived the district court of jurisdiction even though petitioner in his complaint alleged deprivation of personal liberties of vast magnitude, and proved by evidence that the allegations of the complaint were true.

3. Whether deprivation of personal liberties of the magnitude alleged in the complaint and found by the district court to be involved is such as to require exercise of this Court's supervisory powers over federal agents and lower federal courts and grant review by certiorari in this case.

4. Whether the Court of Appeals erred in vacating the judgment of the district court granting preliminary injunction despite undisputed proof that petitioner's personal liberties of the magnitude alleged in the complaint were involved.

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED.

Title 28, United States Code, Section 1331:

"(a) The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States."

Title 28, United States Code, Section 1343:

"§ 1343. Civil rights and elective franchise.

"The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person: * * *

"(4) To recover damages or to secure equitable or other relief under any act of congress providing for the protection of civil rights, including the right to vote. As amended Sept. 3, 1954, c. 1263, § 42, 68 Stat. 1241; Sept. 9, 1957, Pub. L. 85-315, Part III, § 121, 71 Stat. 637."

Title 28, United States Code, Section 1361:

"§ 1361. Action to compel an officer of the United States to perform his duty.

"The district courts shall have original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff. Added Pub. L. 87-748, Sec. 1(a), Oct. 5, 1962, 76 Stat. 744."

Title 5, United States Code, Section 300:

"§ 300. Officials for detection and prosecution of crimes.

"For the detection and prosecution of crimes against the United States and for the acquisition, collection, classification and preservation of identification and other records and their exchange with, and for the official use of, the duly authorized officials of the Federal Government, of States, cities, and other institutions, such exchange to be subject to cancellation if

dissemination is made outside the receiving departments or related agencies, the Attorney General is authorized to appoint officials who shall be vested with the authority necessary for the execution of such duties. Pub. L. 87-264, Title II, § 201, Sept. 21, 1961, 75 Stat. 551."

Amendment IV—Searches and Seizures.

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Amendment V—Capital Crimes; Double Jeopardy, Self-Incrimination; Due Process, Just Compensation for Property.

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time or War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Federal Rules of Civil Procedure, Rule 8(a):

"(a) Claims for Relief. A pleading which sets forth a claim for relief, whether an original claim, counter-claim, cross-claim, or third-party claim, shall contain (1) a short and plain statement of the grounds upon which the court's jurisdiction and the claim needs no new grounds of jurisdiction to support it, (2) a short and plain statement of the claim showing that the pleader is entitled to relief, and (3) a demand for judgment for the relief to which he deems himself entitled. Relief in the alternative or of several different types may be demanded."

STATEMENT.

Petitioner, San Giancana, is a citizen of the United States; and since 1954, he has lived with his family in the Village of Oak Park, Illinois. (App. 19, 20, 176, 259).[1] His home, a two-story bungalow, is situated on the northwest corner of South Wenonah and Fillmore Streets in the Village. (App. 20). In order to use his home petitioner, his friends and acquaintances require uninterrupted access and egress to petitioner's residence. (App. 20).

At no time has either petitioner, any member of his family, or anyone else committed any violation of any law at, near petitioner's home, or anywhere else. (App. 21-44). At no time has respondent or any of his agents any reason to believe otherwise. Respondent has never had any search warrant to search or scrutinize petitioner's home or keep it under surveillance, nor has respondent had any grand jury indictment or mittimus for petitioner or for any person in and about petitioner's home. At no time has respondent or any of his agents had any reason to believe that any act in violation of any law was being committed by petitioner or anyone else in and about petitioner's home. (App. 21, 26, 39-41).

Beginning on June 10, 1963, petitioner noticed that in and about his home, over a 24-hour period, there were vehicles as close as 20 to 40 feet to his residence. These

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[1] The record was printed in the court below as an Appendix to the Brief. Therefore, record references are to the printed appendix, thus: (App. ....).

vehicles numbered not less than three and sometimes as many as five. (App. 22). In each of these vehicles were two men. These vehicles were equipped with "Walkie-talkie" radios, with binoculars with which men in the vehicles looked into petitioner's home and with telescopic lens cameras with which the men photographed the interior of petitioner's residence. (App. 22). These vehicles were noticed by a maid employed by petitioner and the men were identified as an "• • • FBI man • • •" and "• • • an agent of the Federal Bureau of Investigation • • •" (App. 40).

Whenever petitioner left his home after June 10, 1963, to go to stores, restaurants, or his golf course, the vehicles near his home followed him. The men in these vehicles stayed close to petitioner, and on occasions spoke to him in a humiliating fashion, loud enough for others to hear, telling him that they would stay close to him and keep him under constant surveillance, so as to interfere with the exercise of his right of personal liberty and privacy. (App. 24).

The identity of the men in the vehicles as agents of the Federal Bureau of Investigation, under the supervision and control of respondent, became known to petitioner because on one occasion petitioner had seen one of these men and recognized him by the name of "Roamer," a man "• • • from the FBI • • •" (App. 260). Two of these men identified themselves as FBI men to a maid employed by petitioner. (App. 40-41). One, the agent named Roamer, introduced himself to a member of petitioner's party at the golf course. (App. 228-230). Later, on another occasion, this agent introduced a Mr. Marshall, saying, "He was an FBI man." (App. 238). On July 10, 1963, and on some 15 or 16 occasions when petitioner was at the golf

course he patronized there were men in and about who identified themselves to the Manager as "* * * federal agents * * *" (App. 47-48; 204-205).

On June 24, 1963, petitioner consulted an attorney who demanded of respondent that "* * * as the agent in charge of the Federal Bureau of Investigation * * *" the men under respondent's command be removed from the vicinity of petitioner's home. (App. 17-18). This telegram was delivered on June 25, 1963, at about 10:52 a.m. (App. 18).

Respondent did not answer petitioner's demand. (App. 17-18). When called as an adverse witness (App. 218), respondent was asked whether he received the telegram (App. 218), and whether, in answer to the telegram, he had called the office of petitioner's attorney and said he would not "* * * remove from the residence of Mr. Sam Giancana the 24-hour surveillance of FBI agents that (he had) placed there * * *." Respondent refused to answer the question. (App. 219-222).

Petitioner filed his complaint seeking only injunctive relief in the district court for violation of rights secured to him by the Fourth and Fifth Amendments to the Constitution of the United States. (App. 8-18; 19-30). A motion for preliminary injunction was filed, supported by affidavits. (App. 36-48).

In his pleading petitioner did allege that any amount of money as being involved, relying that "* * * it is incongruous to hold that a formal allegation of the amount in controversy is necessary when personal liberty of such magnitude alleged in the complaint and found by the district court are involved * * *" (See dissent of Swygert, J, Appendix "A").

Respondent moved to dismiss. (App. 31). No counter affidavits were filed by respondent in response to those in support of the motion for preliminary injunction. (App. 36-48).

Hearing on the motion for preliminary injunction was set by the trial judge. (App. 154). Petitioner, in support of his motion called nine witnesses. (App. 171-277). In addition, petitioner called respondent as an adverse witness (App. 218-225; 277-281); but respondent refused to answer any questions asked of him because of "* * * instructions from the Attorney General of the United States, and pursuant to Departmental Order No. 260-62 * * *." (App. 219).[2]

Respondent offered no evidence, testimonial or otherwise.

At the close of the hearing counsel for the petitioner submitted the matter to the court stating that "* * * we are not dealing here with the proof of the matter on the merits, so that in considering whether or not the preliminary motion should be allowed, I respectfully ask Your Honor to consider also the allegations in the amended complaint, supported by affidavit, and the fact that none of the allegations, nor the evidence submitted to you, has been contradicted or rebutted, or even tested by any question whatsoever from the defendant * * *." (App. 283).

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[2] For refusals to answer questions put to him as an adverse witness under the rules, respondent was adjudged guilty of contempt by the district judge. (App. 54-60). On appeal, the Court of Appeals affirmed the contempt conviction. *Giancana* v. *Johnson*, 7 Cir. 335 F. 2d 372.

On July 16, 1963, the court dismissed the complaint as to one of the defendants, J. Edgar Hoover (App. 284); and denied the motion to dismiss as to respondent. (App. 284). The propriety of this order was not included in the appeal; nor was there a request made in the court of appeals for permission to appeal under 28 U.S.C. 1292(b).

The trial court ruled that the "allegations as uncontradicted and undenied * * *." (App. 284). Findings of Fact and Conclusions of Law were adopted (App. 63-69); and thereafter, the order for preliminary injunction was entered. (App. 53). A broader injunction order tendered by petitioner (App. 78-80) was rejected by the trial judge. (App. 78). Respondent then appealed only from the order granting the preliminary injunction. (App. 74). Petitioner cross-appealed from the denial of the broader injunction order. (App. 78, 78-30; 84).[3]

On review, the Court of Appeals held that the district judge erred in entertaining the suit because having only jurisdiction conferred by Congress, the district court's power was limited, so far as it is based on Section 1331, to controversies involving a sum or value in excess of $10,000. Since plaintiff failed to allege that a sum or value in excess of $10,000 was involved, the district court lacked jurisdiction of the cause. Accordingly, the court held that "* * * since there was no jurisdiction, * * *" the judgment was vacated and cause remanded.

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[3] On petitioner's motion, the cross appeal was later dismissed in the Court of Appeals.

Of the panel of three judges, one, Judge Swygert, dissented, saying:

> "This court holds, however, that the complaint was fatally defective because there was no express allegation that the amount in controversy exceeded $10,000 and that this amount could not be inferred from the facts in the complaint.
>
> "It is incongruous to hold that a formal allegation of the amount in controversy is necessary when personal liberties of the magnitude alleged in the complaint and found by the district court are involved. To require a dollar value to be specifically averred in these circumstances is to exalt form over substance.
>
> "It is my opinion the fact that there was no formal allegation of the requisite jurisdictional amount did not prevent the district court from assuming jurisdiction. The complaint alleged that the defendant and his agents deprived plaintiff of the use of his home that they violated his right of privacy and personal liberty. From these allegations the district court could infer, contrary to what the majority indicates, that the amount in controversy exceeded $10,000. * * *"

REASONS FOR GRANTING THE WRIT.

1. This case presents a revolting example of arbitrary conduct by an agent of the Federal Government. It is conduct that brings to mind all of the historical reasons urged for the adoption of a Bill of Rights to our Constitution. Rutland, Birth of the Bill of Rights, 78-105 (1955); Dumbauld, The Bill of Rights, 10-33 (1957); Hand, The Bill of Rights, 2-5 (1958).

2. The first ten amendments, particularly the Fourth and Fifth, embodied limitations on powers of the Federal Government or its agents, guaranteeing constitutional protections comparable to those in the English Bill of Rights. 1 W. & M., Sess. 2, ch. 2 (1689). In English Constitutional history the Bill of Rights was a milestone which forged a link with the Thirty-Ninth Chapter of Magna Carta. "No free man shall be taken or imprisoned, or disseised, or outlawed, or banished, or in anyways destroyed, nor will we pass upon him, nor will we send upon him, unless by the lawful judgment of his peers, or by the law of the land." McKechnie, Magna Carta, 375-395 (2d ed. 1914).

Our Constitution and our system of constitutional government reflect a decision that the Federal Government and its agents are limited in powers and methods that may be used. Powers are withheld from government agents or, alternatively stated, freedoms or liberties of the citizen are set forth in order to guarantee that the individual shall be free from arbitrary official interference, except when a rational basis for intrusion exists. Beaney, "The Constitutional Right to Privacy," in 1962 Supreme Court Review 214 (Kurland ed. 1962).

3. This petition presents a unique case involving fundamentals of constitutional liberty. The record discloses that petitioner's constitutional right to be left alone by the government and its agents, his rights to be free from illegal restraint, were desecrated by respondent acting as an agent of the Federal Government. Corwin, Liberty Against Government (1948); Douglas, Right of the People, ch. 2 (1958).

In *Boyd* v. *United States,* 116 U.S. 616, 627-630 this Court referred to Lord Camden's judgment in the historic case of *Entick* v. *Carrington,* 19 Howell's State Trials, 1030 and said:

> "The principles laid down in this opinion affect the very essence of constitutional liberty and security. They reach farther than the concrete form of the case there before the court, with its adventitious circumstances; they apply to all invasions on the part of the government and its employees of the sanctities of a man's home and the privacies of life. It is not the breaking of his doors, and the rummaging of his drawers, that constitutes the essence of the offense; but it is the invasion of his indefeasible right of personal security, personal liberty and private property, where that right has never been forfeited by his conviction of some public offense * * *."

4. Respondent's infringement of petitioner's liberty was not incidental. Respondent placed a cordon of vehicles around petitioner's home, maintained a 24 hour a day electronic vise around petitioner, sustained a constant intrusion into the most intimate of petitioner's privacy by the use of binoculars, long-ranged cameras and incessant surveillance of petitioner which amounted to his arrest without a warrant and incarceration without conviction. (App. 19-39; 39-48).

Without a court order, a charge, accusation or an indictment, respondent used his position as an agent of the Federal Government and administratively without notice decided that petitioner's liberty and freedom were to be restricted through agents under respondent's command. Respondent's agents followed petitioner when he went to public places, intruded on petitioner when he went to the most sacred of all places, his church and to the mausoleum where the remains of his wife were interred. (App. 259-272; 273-277). The invasion of petitioner's privacy, the intrusion by respondent into his liberty and freedom were systematic and calculated to deprive petitioner of his liberty without lawful authority of any kind. When respondent was asked to justify his conduct he refused to do so. The district judge found that respondent "* * * has not shown to the court any reason or justification for the surveillance and the observation of the * * *" petitioner as shown in the record. (App. 67).

5. Contrary to the conclusion of the Court below that petitioner "* * * failed to allege, or otherwise show, * * * facts from which that essential jurisdictional element may be inferred, * * *" (Appendix "A", 8a) the record is replete with uncontroverted evidence showing that petitioner's personal liberty of vast magnitude was involved. Anglo-American law has never placed a monetary value on liberty.

In an action to protect by injunction a right secured by law, it is the value of the right sought to be protected which determines the amount in dispute for jurisdictional purposes. *Bell* v. *Hood*, 327 U.S. 678; *Bell* v. *Hood*, D. Cal., 71 F. Supp. 813; *McNutt* v. *General Motors Acceptance Corporation*, 298 U.S. 178; *Federated Mutual Implement and Hardware Insurance Company* v. *Stein-*

heider, 8 Cir., 268 F. 2d 734, 738; Bunn, Jurisdiction and Practice of the Courts of the United States, 64-65. When the record is viewed in this context, it is clear that petitioner proved the jurisdictional requirement that "* * * the matter in controversy exceeds the sum or value of $10,000. * * *"

Judge Swygert in his dissent from the majority used language which illumines petitioner's position:

> "It is incongruous to hold that a formal allegation of the amount in controversy is necessary when personal liberties of the magnitude alleged in the complaint and found by the district court are involved. To require a dollar value to be specifically averred in these circumstances is to exalt form over substance." (Appendix, "A" 12a).

6. Obviously, the Court of Appeals misconstrued petitioner's case in two fundamental respects:

(a) The court erred in holding that petitioner failed to show that the essential jurisdictional amount was involved. The court overlooked the testimonial evidence of nine witnesses (App. 171-277); the affidavits in support of the motion (App. 36-48); the refusal of respondent to answer proper questions (App. 218-225; 277-281); and petitioner's testimony under oath untested by cross examination (App. 259-275). Thus, petitioner's case presents the amazing picture of every fact he alleged proved by uncontroverted evidence.

(b) The court erred in concluding that under our federal system where fundamental liberties of a citizen are purposefully and intentionally infringed by respondent, an agent of the Federal Government, rote requirement dictates that a price of $10,000 be put on values so sacred and historically so treasured.

7. Procedural, jurisdictional and constitutional questions of vast importance are involved in this case. This court should exercise its supervisory powers over federal agents, *Rea* v. *United States,* 350 U.S. 214; *Wilson* v. *Schnettler,* 365 U.S. 381, and reverse the court below in the exercise of this court's power of review over lower federal courts. *Riverbank Laboratories* v. *Hardwood Products Corporation,* 7 Cir., 220 F. 2d 465, rev'd, 350 U.S. 214, amended 350 U.S. 1012.

CONCLUSION.

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

WILLIAM R. MING, JR.,
Counsel for Petitioner.

November 19, 1964

APPENDIX

APPENDIX "A"

In The

UNITED STATES COURT OF APPEALS

For The Seventh Circuit

No. 14272 September Term, 1963 April Session, 1964

Sam Giancana,
Plaintiff-Appellee,
vs.
Marlin W. Johnson, Agent in Charge, Chicago Office of the Federal Bureau of Investigation,
Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

June 30, 1964

Before SCHNACKENBERG, KILEY and SWYGERT, *Circuit Judges.*

KILEY, *Circuit Judge.* The question is whether the district court had jurisdiction to entertain this "action to procure and protect the civil rights of plaintiff," growing out of alleged surveillance of plaintiff, his home and his recreation, by FBI agents under defendant's supervision and direction. We think the record shows the court did not have jurisdiction.

(Appendix)

The Complaint,[1] as amended, was based upon claim of a "federal question," 28 U.S.C. § 1331,[2] arising under the Fourth[3] and Fifth[4] Amendments to the United States Constitution; and a civil rights violation under § 1343(4).[5]

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[1] The original complaint's caption included § 1346(a)(2) and (b), but this reference was omitted from the amended complaint.

[2] 28 U. S. C. §1331 provides in pertinent part:

"(a) The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000 * * * and arises under the Constitution, laws, or treaties of the United States."

[3] The Fourth Amendment to the United States Constitution provides:

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

[4] The Fifth Amendment to the United States Constitution provides in pertinent part:

"No person shall be * * * deprived of life, liberty, or property, without due process of law * * *."

[5] 28 U.S.C. § 1343 provides in pertinent part:

"The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

* * * * *

"(4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote."

(Appendix)

The district court denied defendant's motion to dismiss which challenged the complaint on jurisdictional grounds.

The district court, on the "sworn amended complaint, affidavits and evidence of the plaintiff," found that plaintiff's constitutional rights to privacy, personal liberty and freedom were violated by the surveillance; and that unless defendant was restrained plaintiff would suffer irreparable injury. The court granted a preliminary injunction. We stayed the effect of the injunction, pending appeal. *Giancana* v. *Hoover*, 322 F. 2d 789 (7th Cir. 1963).

District courts are courts of limited jurisdiction, possessing only the jurisdiction that Congress has conferred upon them by statute. *Klein* v. *Lee*, 254 F. 2d 188, 190 (7th Cir. 1958), citing *Lockerty* v. *Phillips*, 319 U.S. 182 (1943). And the jurisdiction conferred upon federal courts to entertain suits arising under the Constitution or laws of the United States has been "narrowly limited." *Hague* v. *C.I.O.*, 307 U.S. 496,507 (1939). Furthermore, this court has the duty to satisfy itself of the jurisdiction of the district court. *Jackson* v. *Kuhn*, 254 F. 2d 555, 560 (8th Cir. 1958).

The vital question depends on whether the record shows that "the matter in controversy exceeds the sum or value of $10,000 * * *" so as to give the district court jurisdiction under 28 U.S.C. § 1331.

Courts may not treat as a mere technicality the jurisdictional amount essential to the "'federal question" jurisdiction, even in this case where there is an allegedly unwarranted invasion of plaintiff's privacy. The showing of that essential is not a mere matter of form, but is a necessary element. Congress in § 1331 expressed the "federal ques-

tion" jurisdiction in plain words. The district courts and suitors are bound by the words expressed. Congress could have withheld the jurisdiction entirely, as it did from 1789 to 1875. Or it could have given jurisdiction over suits arising "under the Constitution, laws, or treaties of the United States" simply. But it limited the jurisdiction by including the element of the sum or value of the matter in controversy, and the Congressional will is that unless that sum or value is shown there is no "federal question" presented and no jurisdiction.

Neither may a party invoke the district court's jurisdiction by treating that element as though not essential; nor choose not to amend his complaint or otherwise show, as plaintiff did here, that the jurisdiction sum or value is in controversy, thus opposing his will to the Congressional will.

In *Jackson* v. *Kuhn*, 254 F. 2d 555, 560 (8th Cir. 1958), the Eighth Circuit affirmed the district court's dismissal of a diversity suit to restrain United States Army officers "from * * * policing, occupying or interfering with the property or the students of Little Rock Central High School * * *" because there was "no allegation in the complaint that the value of the matter in controversy exceeds $3,000,"* and no facts stated from which the requisite pecuniary value could be inferred. And the Fifth Circuit in *Walton* v. *City of Atlanta*, 180 F. 2d 143, 144 (5th Cir. 1950), on its own motion in a "federal question" suit found federal jurisdiction lacking because "[f]rom the allegations of the complaint, it does not appear that the

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* The jurisdictional amount was increased to $10,000 in 1958. 72 Stat. 415.

amount in controversy exceeds three thousand dollars" so as to confer jurisdiction under § 1331.

Plaintiff concedes that *Jackson* v. *Kuhn*, 254 F. 2d 555 (8th Cir. 1958), and *Van Buskirk* v. *Wilkinson*, 216 F. 2d 735 (9th Cir. 1954), support defendant's contention that the district court did not have jurisdiction because the jurisdictional amount is not expressly alleged in the complaint. Here the complaint makes no express allegation of the essential jurisdictional sum or value. Plaintiff argues, however, that the jurisdictional sum or value should be inferred from the allegations, supported by unimpeached affidavits. But there are no facts from which that necessary element can be inferred. If, as plaintiff contends, the sum or value cannot be alleged because of the priceless rights involved, how can this court infer that essential element? And there is no finding of the essential sum or value and no evidence on which to base a finding.

Congress had a reason for setting the minimum jurisdictional sum or value in limiting the jurisdiction of the district court.[7] (It surely knew of the priceless nature of

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[7] The purpose for setting the jurisdictional amount at $10,000 in 1958 was explained in the Senate Report accompanying the bill:

"The recommendations of the Judicial Conference regarding the amount in controversy, which this committee approves, is based on the premise that the amount should be fixed at a sum of money that will make jurisdiction available in all substantial controversies where other elements of Federal jurisdiction are present. The jurisdictional amount should not be so high as to convert the Federal courts into courts of big business nor so low as to fritter away their time in the trial of petty controversies."

S. Rep. No. 1830, 85th Cong., 2d Sess. (1958), 1958 U. S. Code Cong. & Ad. News, 3099, 3101.

liberty and privacy when it required a showing of that element.) And placing the burden of estimating the value of one's claim upon him who sues is not unusual. If, for instance, plaintiff had chosen to sue for damages under § 1331, as plaintiff did in *Bell* v. *Hood*, 327 U.S. 678 (1946), for alleged violation of his Fourth and Fifth Amendment right of privacy—the basic claim here—he would have had to estimate the value of his claim. "Plaintiff is master of his claim,"[8] and it is no answer to failure to bring his claim within the jurisdictional prerequisite that the value is inestimable.

Finally plaintiff contends that the subject matter "in controversy"—the use of his home, his personal liberty and freedom, the tortious conduct of defendant and invasion of plaintiff's private rights—is admitted by defendant's motion to dismiss, and that the substantive issue of the amount of damage awaits ultimate resolution in the trial court upon hearing of the cause on its merits. We disagree. The validity of the court's ruling must be determined as of the time it was made.

To support his argument about deferring resolution of the jurisdictional question plaintiff relies upon *McNutt* v. *General Motors Corp.*, 298 U.S. 178 (1936). That case does not require, in the circumstances before us, that determination of the jurisdictional issue be deferred until plaintiff has an opportunity to furnish proof of his charges. We read *McNutt*, involving Indiana law regulating purchase of installment sales contracts, so far as per-

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[8] WRIGHT, FEDERAL COURTS 98 (1963).

tinent here, to decide that if the requisite jurisdictional facts are alleged, and challenged, the plaintiff must support them by competent proof, and that in such a case an inquiry might be necessary to determine whether the facts support the allegations of jurisdiction; but that if the plaintiff fails to allege the facts prerequisite to show jurisdiction he has no standing. 298 U.S. at 189.

The district court erred in entertaining the suit before us because, having only the jurisdiction conferred by Congress, its jurisdiction was limited, so far as it is based upon § 1331, to controversies involving a sum or value in excess of $10,000, and plaintiff failed to allege, or otherwise show, his damage accordingly, or to allege, or otherwise show, facts from which that essential jurisdictional element may be inferred.

The court had no jurisdiction either, of the claims under § 1343(4), the "Civil rights and elective franchises" section: "To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights * * *." Plaintiff does not allege nor show us otherwise "any Act of Congress" of whose violation he complains.[9]

There is no merit in the contention that defendant cannot raise the question of lack of jurisdiction because he did

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[9] Although no Act of Congress is set forth in the complaint to show jurisdiction under § 1343(4), plaintiff refers us, in his brief, to 28 U.S.C. § 1361 and 42 U. S. C. § 1985. We think plaintiff's references are insubstantial and warrant dismissal for want of jurisdiction. See *Bell* v. *Hood*, 327 U.S. 678, 682-83 (1946).

not comply with 28 U. S. C. § 1292(b).[10] That section does not apply because the order is "otherwise appealable" under § 1292(a)(1),[11] and this court can itself note a jurisdictional defect. *McNutt* v. *General Motors Corp.*, 298 U. S. 178, 187 (1936).

Since there was no jurisdiction, we do not reach the other points raised.

Judgment vacated and the cause remanded for proceeding not inconsistent with this opinion.

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[10] 28 U.S.C. § 1292(b) provides in pertinent part:

"(b) When a district judge, in making in a civil action an order *not otherwise appealable under this section*, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals may thereupon, in its discretion, permit an appeal to be taken from such order * * *." (Emphasis added.)

[11] 28 U.S.C. § 1292(a) provides in pertinent part:

"(a) The courts of appeals shall have jurisdiction of appeals from:

"(1) Interlocutory orders of the district courts of the United States * * * granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions, except where a direct review may be had in the Supreme Court * * *."

(Appendix)

No. 14272.

SWYGERT. *Circuit Judge,* dissenting.

Defendant Marlin W. Johnson, special agent in charge of the Chicago office of the Federal Bureau of Investigation, appeals from a preliminary injunction issued by the district court restraining defendant and his agents from maintaining more than one car within one block of plaintiff's home, from having more than one car at any one time following plaintiff, and directing that at least one foursome intervene between plaintiff and FBI agents when plaintiff plays golf.

The district court, following a hearing on the application for the preliminary injunction, entered findings of fact.[1]

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[1]The district court's findings include the following:

That plaintiff's evidence tended . . . to prove that Agents of the Federal Bureau of Investigation kept plaintiff and his home, together with his relatives, friends and associates, under constant surveillance and observation at his home twenty-four hours per day. That since the evidence of the plaintiff was not contradicted by any evidence offered by the defendant, nor were any counter-affidavits filed by the defendant, nor were the witnesses presented by the plaintiff cross-examined by the defendant, the court finds that the vehicles in and about the home of the plaintiff, Sam Giancana, from June 10, 1963 to July 15, 1963 were in the care, custody and control of Agents of the Federal Bureau of Investigation under the direction of the defendant Marlin W. Johnson; and that the Agents of the Bureau who kept plaintiff and his home under constant surveillance and observation

Upon the basis of these findings the district judge concluded that the court had "jurisdiction of the subject matter of this suit, this being an action to protect the civil rights of the plaintiff, Sam Giancana, under the 4th and 5th Amendments to the Constitution of the United States." He further concluded:

> That the rights under the 4th and 5th Amendments to which the plaintiff is entitled as a citizen of the

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twenty-four hours each day were likewise under the direction of the said defendant, Marlin W. Johnson.

That from June 10, 1963 to July 15, 1963 at times when the plaintiff was at his home, Agents of the Federal Bureau of Investigation followed the plaintiff wherever he went keeping him under constant observation and surveillance twenty-four hours each day.

That on one occasion Agents of the Federal Bureau of Investigation followed the plaintiff as he went about his private affairs and they said to him: "We are going to give you protection, Sam"; "Why don't you get out of town and cut all this stuff out, or get out of the country."

That on June 30, 1963 Agents of the Federal Bureau of Investigation followed the plaintiff, Sam Giancana, and members of his family as he went about his private affairs and went to the home of Mrs. Rose Flood where plaintiff and members of his family went to visit. Agents of the Federal Bureau of Investigation remained outside of the home of Rose Flood flashing the lights of their vehicles as signals and maintaining constant surveillance of the home of Rose Flood while the plaintiff Sam Giancana was in and about said residence.

That during the period June 10, 1963 and July 15, 1963 Agents of the Federal Bureau of Investigation

(Appendix)

United States and a person within the jurisdiction of the United States are: (1) The right to be free from arbitrary intrusion into his privacy by Agents of the Federal Government, without due process of law; (2) the right to be free from deprivation of his liberty and freedom by agents of the Federal Bureau of Investigation without due process of law; and (3) the right to be let alone by agents of the Federal Bureau of Investigation unless there be reasonable grounds to justify interference of plaintiff's liberty and freedom by said agents.

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followed the plaintiff Sam Giancana to the golf club where he patronizes and remained close to him and those with whom he played golf so that Agents of the Federal Bureau of Investigation numbering from two to four were directly behind plaintiff and his friends as they played golf, being immediately the next foursome following plaintiff and the group with which he was playing golf.

That during the period June 10, 1963 to July 15, 1963 the number of vehicles which the defendant Marlin W. Johnson maintained in and about the home of the plaintiff Sam Giancana at 1147 South Wenonah Street, Village of Oak Park, Illinois, numbered variously from two to as many as five each with two Agents of the Federal Bureau of Investigation for the purpose of maintaining constant twenty-four hour a day observation and surveillance of the plaintiff and his home and to follow him as he went about his private affairs.

That the defendant has not shown to the court any reason or justification for the surveillance and observation of the plaintiff as shown by the evidence.

(Appendix)

Defendant did not include in his interlocutory appe
the denial of his motion to dismiss. This court holds, ho
ever, that the complaint was fatally defective beca
there was no express allegation that the amount in co
troversy exceeded $10,000 and that this amount could n
be inferred from the facts in the complaint.

It is incongruous to hold that a formal allegation o
the amount in controversy is necessary when person
liberties of the magnitude alleged in the complaint a
found by the district court are involved. To require
dollar value to be specifically averred in these circu
stances is to exalt form over substance.

In my opinion the fact that there was no formal alle
tion of the requisite jurisdictional amount did not prev
the district court from assuming jurisdiction. The co
plaint alleged that defendant and his agents depriv
plaintiff of the use of his home and that they violated h
right of privacy and personal liberty. From these alle
tions the district court could infer, contrary to what th
majority indicates, that the amount in controversy ex
ceeded $10.000.

I would affirm.

A true Copy:

Teste:

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Clerk of the United States Court o
Appeals for the Seventh Circuit.

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FILED
JAN 5 1965
JOHN F. DAVIS, CLERK

No. 705

In the Supreme Court of the United States

OCTOBER TERM, 1964

SAM GIANCANA

v.

MARLIN W. JOHNSON, AGENT IN CHARGE, CHICAGO OFFICE OF THE FEDERAL BUREAU OF INVESTIGATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1–12) is reported at 335 F. 2d 366.

JURISDICTION

The judgment of the court of appeals was entered on June 30, 1964. On September 28, 1964, Mr. Justice Brennan extended the time for filing a petition for a writ of certiorari to and including November 20, 1964, on which date the petition was filed. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

758-568—65

QUESTION PRESENTED

Whether petitioner's complaint and the record made at a hearing provided a basis for federal district court jurisdiction.

STATUTE INVOLVED

Title 28, United States Code, provides in pertinent part:

Section 1331:

(a) The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States.

(b) Except when express provision therefor is otherwise made in a statute of the United States, where the plaintiff is finally adjudged to be entitled to recover less than the sum or value of $10,000, computed without regard to any setoff or counterclaim to which the defendant may be adjudged to be entitled, and exclusive of interests and costs, the district court may deny costs to the plaintiff and, in addition, may impose costs on the plaintiff.

Section 1343:

The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

(1) To recover damages for injury to his person or property, or because of the deprivation of any right or privilege of a citizen of the United States, by any act done in furtherance of any conspiracy mentioned in section 1985 of Title 42;

(2) To recover damages from any person who fails to prevent or to aid in preventing any wrongs mentioned in section 1985 of Title 42 which he had knowledge were about to occur and power to prevent;

(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States;

(4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote.

STATEMENT

On June 27, 1963, in the United States District Court for the Northern District of Illinois, petitioner filed a civil action against J. Edgar Hoover, Director of the Federal Bureau of Investigation, and Marlin W. Johnson, the agent in charge of the Bureau's Chicago office, alleging that his Fourth and Fifth Amendment rights were being infringed by an F.B.I. surveillance of his home and activities. Petitioner prayed for preliminary and permanent injunctions, but did not ask for money damages (App. 8–18).[1]

[1] "App." refers to the government's appendix, "Supp. App." to the government's supplemental appendix, and "Br. App." to petitioner's brief in the court below. We have lodged the supplemental appendix and petitioner's brief with the Clerk of this Court.

His complaint, which alleged jurisdiction under 28 U.S.C. 1331 and "the 4th and 5th Amendments to the Constitution," did not allege that the matter in controversy exceeded the value of $10,000 (App. 8).

On the following day the parties appeared at a hearing in the district court on petitioner's motion for a temporary restraining order and on the government's motion to dismiss the complaint for the reason, *inter alia*, that the court lacked jurisdiction over the subject matter (App. 31, 32–34, 36–117). At the hearing the government contended that the court had no jurisdiction under Section 1331 because it was not alleged that $10,000 was in controversy. Petitioner's counsel stated that the action was brought under Section 1331, but that the Section's jurisdictional amount requirement had no application to actions involving "fundamental civil rights" (App. 89). Government counsel observed that another statutory provision, 28 U.S.C. 1343, which conferred jurisdiction on the district courts to entertain actions brought under federal civil rights statutes, did not contain a jurisdictional amount requirement. But the prosecutor noted that petitioner's action did not fall under any of those statutes (App. 89–93, 102–103). At the end of the hearing, the court continued the matter until July 12.

On July 11, the day before the second hearing, petitioner filed an amended complaint in which he deleted all reference to Section 1331 from the paragraph alleging jurisdiction, leaving only his citation of the Fourth and Fifth Amendments. The caption of the

complaint was amended, however, to read, "28 U.S.C.A., Section 1331 and 1343(4), Amend. 4 and Amend. 5, Constitution of the United States" (App. 19). As in his original complaint, petitioner did not allege the amount in controversy.

Further hearings were held on July 12, 15 and 16 (App. 117–293). Throughout, the government contended that the district court was without power to entertain the action if petitioner refused to allege the required jurisdictional amount. Twice during the hearing on July 12, the government called to petitioner's attention, as well as to the attention of the court, that the jurisdictional defect would be cured if petitioner were to amend his complaint to allege that the amount in controversy exceeded $10,000 (App. 130, 146). Petitioner, however, took no steps to amend. Instead, he argued that "there is no need for jurisdictional amount because it is basically a civil rights question and no particular amount need be alleged;" that district judges have "inherent power," irrespective of jurisdictional statutes, to enjoin violations of the constitution; and that, in any event, jurisdiction rested upon Section 1343(4) (App. 130–132, 139, 142–144). At the hearing of July 15, petitioner introduced testimony of witnesses in support of the factual allegations in his complaint. The government, maintaining that the court lacked jurisdiction, did not cross-examine these witnesses or offer any evidence.

Ruling on the government's motions, the district

court dismissed the complaint as to defendant Hoover, for lack of jurisdiction over his person, but refused to dismiss as to defendant Johnson (App. 284). On July 24, 1963, the court, after concluding that it had jurisdiction under the Fourth and Fifth Amendments, issued a preliminary injunction restraining defendant Johnson from (1) "maintaining more than one car within one block" of petitioner's home; (2) "having more than one car at any time following" petitioner; and (3) having less than "one foursome intervene" between F.B.I. agents and petitioner on the golf course (App. 53, 67).

The order was stayed pending appeal (App. 306; Supp. App. 8–9). The court of appeals, with one judge dissenting, reversed the district court and held that the district court lacked jurisdiction because of petitioner's failure to allege and to show that the jurisdictional amount was in controversy and because no other federal jurisdictional statute was applicable (Pet. App. 1–12; 335 F. 2d 366). It remanded the case for further proceedings.

ARGUMENT

In its present posture this case involves only a limited jurisdictional issue on which, we submit, the court of appeals ruled correctly. As a basis for the district court's jurisdiction, petitioner invoked 28 U.S.C. 1331 and 28 U.S.C. 1343(4). Federal jurisdiction under the former provision depends on a showing that "the matter in controversy exceeds the sum or value of $10,000," and this requirement is applicable even if only injunctive relief is sought and

even if the complaint alleges an infringement of the plaintiff's constitutional rights. *E.g., Hague* v. *Committee for Industrial Organization*, 307 U.S. 496, 508; *McNutt v. General Motors Acceptance Corp.*, 298 U.S. 178. Jurisdiction under Section 1343(4) depends on whether the claim is for relief "under any Act of Congress providing for the protection of civil rights, including the right to vote." Petitioner failed to meet the requirements of either statute since his complaint did not allege that $10,000 was in controversy nor did it invoke any civil right for which Congress has, by statute, granted a civil remedy.[2] Accordingly, the court of appeals properly concluded that the complaint, as amended, failed to allege any basis for federal jurisdiction. See Rule 8(a), Federal Rules of Civil Procedure.

There is no merit to petitioner's contention (Pet. 13–14) that the record of the hearing establishes that the matter in controversy exceeded $10,000. Since the government made a timely challenge to petitioner's failure to allege the jurisdictional amount, he had the

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[2] No relevant federal statutes are cited in the complaint or in the petition for certiorari. Petitioner's brief in the court of appeals apparently referred to 42 U.S.C. 1985, which grants a civil remedy to anyone who is deprived of "the equal protection of the laws, or of equal privileges and immunities under the laws" by "two or more persons in any State or Territory [who] conspire or go in disguise on the highway or on the premises of another * * *." See Pet. App. 7a, n. 9. The present claim does not come within that statute. See *Collins* v. *Hardyman*, 341 U.S. 651; *Egan* v. *City of Aurora*, 291 F. 2d 706 (C.A. 7). Nor would 18 U.S.C. 242, which provides criminal penalties for deprivations of constitutional rights under color of any law, constitute a permissible basis for an assertion of jurisdiction since that statute prescribes criminal penalties only.

burden of remedying the pleading defect and of showing, by a preponderance of the evidence, that the required amount was at issue. *McNutt* v. *General Motors Acceptance Corp.*, 298 U.S. 178. This petitioner did not do; instead, he clung steadfastly to his original position that he was not required to plead and to prove the $10,000 amount (see p. 4, *supra*). Not until he reached the court of appeals did he contend that the amount could be inferred from the record (Br. App. 16–18). Consequently, the district court, which found jurisdiction under the Fourth and Fifth Amendments rather than under Section 1331 (App. 67), never made any finding as to monetary value, leaving the record bare of an adequate jurisdictional finding. The record, having been framed under a different theory, is silent about the extent of petitioner's injuries and the value to be attached to his rights. The record contains allegations and testimony concerning the manner in which the surveillance was conducted, but it contains no evidence as to how the surveillance affected petitioner, his family, or his business. Since the court below had no power to speculate about the value of petitioner's rights, it had no choice except to dismiss the action for lack of jurisdiction. *Hague* v. *Committee for Industrial Organization*, 307 U.S. 496; *KVOS, Inc.* v. *Associated Press*, 299 U.S. 269; *McNutt* v. *General Motors Acceptance Corp.*, *supra*.[3]

[3] In *Hague*, involving an injunction against city officials to protect First Amendment rights, this Court held that jurisdiction did not lie under Section 1331 (then 28 U.S.C. 41(1)) because, although replete with evidence of the officials' conduct, the record was "bare of any showing of the value of the asserted

Moreover, the judgment of the court of appeals remanding the case to the district court for further proceedings apparently allows petitioner to move to amend his complaint upon remand in order to make the necessary allegation.[4] In these circumstances, even the narrow jurisdictional question which might be presented if leave to amend were denied or if a constitutional claim valued at less than $10,000 were asserted is not presented by this case.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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HERBERT J. MILLER, JR.,
Assistant Attorney General.

BEATRICE ROSENBERG,
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JANUARY 1965.

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rights to the respondents individually * * *." 307 U.S. at 508. This holding refutes any suggestion that constitutional rights are not subject to the $10,000 requirement of Section 1331. See also *McNutt* v. *General Motors Acceptance Corp.*, *supra* (injunction to protect Fourteenth Amendment rights). Compare *Bell* v. *Hood*, 327 U.S. 678 (where the $10,000 amount was pleaded and this Court took jurisdiction over damage suit against F.B.I. agents for violation of Fourth Amendment). Although the *Hague* majority divided over the construction of Section 1343, they were unanimous in rejecting jurisdiction under Section 1331.

[4] Petitioner has given no indication whatever that he would be unable to claim in good faith that the rights of which he was allegedly deprived exceeded the "value of $10,000."

U.S. GOVERNMENT PRINTING OFFICE: 1965